

**United States Department of Labor
Employees' Compensation Appeals Board**

P.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Wallingford, CT, Employer**

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**Docket No. 09-681
Issued: October 13, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 12, 2009 appellant timely appeals January 23, June 19 and December 10, 2008 decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained an occupational injury in the performance of duty; (2) whether the Office properly denied appellant's request for an oral hearing as untimely filed; and (3) whether the Office properly denied appellant's request for reconsideration without a further merit review.

FACTUAL HISTORY

On October 28, 2007 appellant, then a 54-year-old clerk, filed an occupational disease claim alleging that she sustained severe back pain and pain shooting down the left side of her body due to repetitive bending to pick up trays of mail. She first realized that her condition was related to her employment on October 11, 2007. Appellant did not stop work.

In support of her claim, appellant submitted treatment notes dated October 11 and 18, 2007 from Dr. Kumu Fernando, a Board-certified anatomic pathologist, who noted appellant's complaint of left side sciatica and leg pain. Dr. Fernando also noted that appellant's work required bending and lifting "all day long." She opined that this injury was work related.

On November 15, 2007 the Office advised appellant of the factual and medical evidence necessary to establish her claim and allowed her 30 days to submit additional evidence. In a December 10, 2007 statement, appellant indicated that she began working at the employing establishment in 1989. She noted that her position required repetitive bending and lifting trays of mail between 8 to 12 hours a day. Appellant asserted this weakened and strained her back muscles and nerves. On some days, it was difficult to walk, bend and sit. Appellant did not participate in any physical activities outside of work.

On October 26, 2007 Dr. Fernando noted appellant's complaint of sciatica and buttock pain. She indicated her belief that this was a work-related injury. On November 8, 2007 Dr. Fernando diagnosed left sciatic pain secondary to lifting heavy weights. She also advised that appellant could work light duty. In a November 30, 2007 report, Dr. Fernando noted treating appellant since 1991. She indicated that appellant worked full time lifting heavy sacks and boxes of mail. Dr. Fernando further indicated that appellant experienced "on and off" back pain which was directly related to her work. She noted that appellant did not play any sports or instruments and her hobbies consisted of watching movies. Dr. Fernando opined that the only regular strain on appellant's back was from lifting sacks and boxes of mail, which was directly related and the cause of her back pain. She further opined that appellant had no other injuries that would have caused this diagnosis.

In a January 23, 2008 decision, the Office denied appellant's compensation claim finding that the medical evidence did not establish that the claimed medical condition resulted from the accepted events.

Appellant submitted a November 27, 2007 treatment note from Dr. Fernando, advising that appellant took medication on an as-needed basis. Dr. Fernando questioned whether appellant's condition was a workers' compensation issue as she suspected it was or something else. Appellant also resubmitted a November 8, 2007 treatment note.

In a letter dated May 10, 2008, appellant requested an oral hearing. She asserted that she did not receive notice of the Office's decision until April 2, 2008. Appellant only found out that a decision had been made because her physician's office contacted her regarding her case. She also submitted an April 10, 2008 oral hearing request form, postmarked April 14, 2008, which she sent to the Board.¹ This was forwarded to the Office's Branch of Hearings and Review where it was received on May 13, 2008.

In a June 19, 2008 decision, the Office denied appellant's oral hearing request finding that it was not filed within 30 days from the January 23, 2008 Office decision. It further found that her claim could be equally well addressed by requesting reconsideration.

¹ No prior appeal was docketed in this matter.

In a July 27, 2008 statement, appellant requested reconsideration, advising that she could not obtain more medical records from her treating physician until the end of August 2008. In an August 23, 2008 statement, she reiterated that she was requesting reconsideration. Appellant noted that the Office had not yet received her medical records as she had sent them an incorrect address. She subsequently submitted a reconsideration request form dated April 10, 2008 and postmarked August 25, 2008. Appellant resubmitted her December 10, 2007 statement.

In a December 10, 2008 decision, the Office denied appellant reconsideration request without a further merit review finding that the evidence submitted was insufficient.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.²

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.³

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁴

ANALYSIS -- ISSUE 1

The record supports that appellant's position as a clerk consisted of repetitive bending and lifting to pick up trays of mail. However, appellant has not provided sufficient medical

² *J.E.*, 59 ECAB ____ (Docket No. 07-814, issued October 2, 2007); *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *D.I.*, 59 ECAB ____ (Docket No. 07-1534, issued November 6, 2007); *Roy L. Humphrey*, 57 ECAB 238 (2005).

⁴ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

evidence to establish that a diagnosed condition is causally related to these identified employment factors.

In a November 30, 2007 report, Dr. Fernando noted that appellant's work required lifting heavy boxes of mail and that she experienced back pain directly related to her work. She also noted that appellant did not play any sports or instruments. Dr. Fernando opined that the only regular strain on appellant's back was from lifting boxes of mail, which was the direct cause of her back pain. She advised that no other injury caused appellant's diagnosed condition. However, the mere fact that work activities may produce symptoms revelatory of an underlying condition does not raise an inference of an employment relation. Such a relationship must be shown by rationalized medical evidence of causal relation based upon a specific and accurate history of employment conditions, which are alleged to have caused or exacerbated a disabling condition.⁵ Dr. Fernando did not specifically address how lifting boxes of mail caused or aggravated appellant's back condition, her opinion is of limited probative value. Moreover, the only diagnosis provided by her was for back pain. However, the Board has generally held that pain is a symptom, not a firm medical diagnosis.⁶

Dr. Fernando's reports dated October 11 to 26, 2007 noted appellant's complaint of pain as well as the fact that her work required bending and lifting "all day long." In these reports, she opined that appellant's injury was work related. Although Dr. Fernando generally supported causal relationship, she failed to provide any medical reasoning to explain how bending and lifting caused her a specific back condition. The Board has held that medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof.⁷ As noted, pain is not a firm medical diagnosis. Although Dr. Fernando diagnosed sciatica, her October 26, 2007 treatment noted that she did not provide medical reasoning to explain how particular work activities such as bending and lifting caused or aggravated this condition.

Consequently, the medical evidence does not establish that appellant sustained an occupational disease causally related to factors of her employment.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant not satisfied with a decision of the Office is entitled to a hearing before an Office hearing representative when the request is made within 30 days after issuance of the Office's decision.⁸ Under the implementing regulations, a claimant who has received a final adverse decision by the Office is entitled to a hearing by writing to the address specified in the decision within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision, for which a hearing is sought.⁹ If the

⁵ *Patricia Bolleter*, 40 ECAB 373 (1988).

⁶ *C.F.*, 60 ECAB ____ (Docket No. 08-1102, issued October 10, 2008).

⁷ *S.S.*, 59 ECAB ____ (Docket No. 07-579, issued January 14, 2008).

⁸ 5 U.S.C. § 8124(b)(1).

⁹ 20 C.F.R. § 10.616(a); *id.*

request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.¹⁰

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.¹¹

ANALYSIS -- ISSUE 2

The Office issued its decision, denying appellant's claim on January 23, 2008. Appellant's request for an oral hearing was dated April 10, 2008. Because the hearing request was made more than 30 days after the January 23, 2008 decision, the Board finds that the Office properly denied appellant's request for a hearing as untimely filed. Appellant is not entitled to a hearing as a matter of right. The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation in requests for hearing.¹²

Although appellant asserted that she did not receive notice of the Office's decision until April 2, 2008, the record indicates that the Office's January 23, 2008 decision was duly mailed to her address of record. The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual. Under the mailbox rule, evidence of a properly addressed letter together with evidence of proper mailing may be used to establish receipt.¹³

The Office also exercised its discretionary authority under section 8124 in considering whether to grant a hearing. It found that appellant's request could be equally well addressed through a request for reconsideration under section 8128 and the submission of new evidence. The Board has held that it is an appropriate exercise of discretion for the Office to apprise appellant of the right to further proceedings under the reconsideration provisions of section 8128.¹⁴ The Board finds that the Office properly exercised its discretion in denying appellant's request for an oral hearing as untimely.

¹⁰ *Teresa Valle*, 57 ECAB 542 (2006).

¹¹ *D.E.*, 59 ECAB ____ (Docket No. 07-2334, issued April 11, 2008).

¹² *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

¹³ *See C.T.*, 60 ECAB ____ (Docket No. 08-2160, issued May 7, 2009); *Larry L. Hill*, 42 ECAB 596 (1991).

¹⁴ *See André Thyratron*, 54 ECAB 257 (2002).

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁵ Section 10.608(b) of Office regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁶

ANALYSIS -- ISSUE 3

Appellant's reconsideration request and subsequent letters dated July 27 and August 23, 2008 did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first two requirements, as noted.

With respect to the third requirement, submitting relevant and pertinent new evidence, appellant submitted a November 27, 2007 treatment note from Dr. Fernando noting appellant's status and questioning whether her condition was a workers' compensation issue as she suspected it was or something else. To the extent that Dr. Fernando indicated support for causal relationship, her report is cumulative as it merely reiterates her previously stated opinion. The submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁷ Additionally, appellant submitted Dr. Fernando's November 8, 2007 report. However, this report was already of record and considered by the Office. As noted, duplicative evidence does not warrant reopening a case. Therefore, the Office properly denied appellant's request for a review on the merits as she failed to meet any of the three requirements, noted above, for reopening a claim for merit review.

On appeal, appellant asserts that she submitted sufficient medical evidence to establish her claim. As noted, however, the Board found that the medical evidence is insufficient to establish that her claimed condition was causally related to her employment duties.

CONCLUSION

The Board finds that appellant did not meet her burden of proof in establishing that she sustained an occupational disease in the performance of duty. The Board also finds that the Office properly denied appellant's request for an oral hearing as untimely filed. The Board

¹⁵ *D.K.*, 59 ECAB ____ (Docket No. 07-1441, issued October 22, 2007).

¹⁶ *K.H.*, 59 ECAB ____ (Docket No. 07-2265, issued April 28, 2008).

¹⁷ *Roger W. Robinson*, 54 ECAB 846 (2003).

further finds that the Office properly denied appellant's request for reconsideration without further merit review.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated December 10, June 19 and January 23, 2008 are affirmed.

Issued: October 13, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board